ORIGINAL

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION—FELONY BRANCH

UNITED STATES OF AMERICA

v.

ALBRECHT GERO MUTH,

Defendant

Cr. No. 2011-CF1-15683

Judge Russell F. Canan

Trial Date: 12/2/13

GOVERNMENT'S MEMORANDUM OF LAW ON PROCEEDING TO TRIAL IN DEFENDANT'S ABSENCE

At the last hearing in this case, on April 25, 2013, the Court ordered briefing on the question whether, under the unique circumstances of this case, the court could proceed to trial if the defendant continued to orchestrate his own unavailability by selectively eating and refusing to eat, thus making it unsafe for the authorities to transport him to the courtroom for the commencement of his trial. The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, submits this memorandum of law in response to the Court's order.

BACKGROUND

Defendant Muth stands charged with first-degree (premeditated) murder with aggravating circumstances, in violation of D.C. Code §§ 22-2101 and 22-2104.01 (b) (4) and (10). In December 2012, Muth began a hunger

strike. Prior to that time, the defendant was present for and participated in extensive competency hearings that spanned nearly three weeks (12/3/12 – 12/20/12). At the conclusion of the competency hearings, the court found the defendant competent to stand trial. Thereafter, the Court reiterated that the trial date was set for March of 2013, and that the trial would go forward as scheduled. The defendant responded, "There will be no trial in March" (12/20/12 Tr. 43). When the court asked if the defendant understood that the case was set for trial, the defendant responded, "Yes. But that is an irrelevant date." (*Id.*).

Since the time of the competency hearing, the defendant has embarked upon a course of conduct whereby he periodically would refuse nutrition and hydration. His refusal of regular sustenance has caused his physical health to deteriorate and has resulted in his hospitalization. At a hearing on March 14, 2013, Dr. Russom Ghebrai, Muth's attending physician, testified that Muth's "self-induced starvation and dehydration" had placed Muth "at imminent risk of death" (3/14/13 Tr. 19). Dr. Ghebrai noted that the acts of standing and even sitting could lead to Muth's sudden death (*id.* at 10-11). Dr. Ghebrai further opined that transporting Muth to court and having him spend the day in trial would constitute a risk to Muth's health (*id.* at 11-12). Dr. Ghebrai noted that Muth occasionally was eating and that if Muth

continued to eat and to accept intravenous hydration, "in 72 hours he will be better" (*id.* at 18-19).

It should be noted that the defendant's course of conduct throughout the proceedings leads to the inescapable conclusion that his behavior of intermittently eating and refusing to eat, such that the authorities have had to keep him at the United Medical Center rather than at the D.C. Jail, and such that the defendant has created a condition that makes it impossible to transport him to court for the commencement of his trial, has been a manipulation designed to fulfill his pronouncement to the court that "[t]here will be no trial in March." Indeed, on March 19, 2013, the court vacated the trial date due to defendant's physical condition and concomitant inability to be transported to the courtroom for his trial to commence.

It should also be noted that the defendant has participated telephonically in all status hearings that have taken place since the Court found him competent to stand trial in December of 2012.

At the hearing on March 14, 2013, this Court found clear and convincing evidence that "simply transporting Mr. Muth from the hospital to the courthouse" would constitute "a substantial risk" to Muth's health or life (3/14/13 Tr. 26). The Court reiterated its earlier ruling that Muth is competent to stand trial (*id.* at 29-30). The Court noted, based on a proffer by a representative from the Department of Corrections, that "we may be way

too far down the road for forc[i]ble feeding at this time because [Muth's] status is so fragile that he couldn't withstand it because it does require intubating and it's an invasive procedure" (*id.* at 41). The Court pointed out, however, that Muth's situation "is a fluid one," and it noted that the case law supports forcible feeding of inmates who are trying to starve themselves to death "to preserve their life, to preserve good order and discipline in the facility in which they're housed, et cetera" (*id.* at 42).

The Court then considered whether it could proceed to trial in Muth's absence, and it cited two cases, *United States v. Benabe,* 654 F.3d 753 (7th Cir. 2011), and *United States v. Cuoco*, 208 F.3d 27 (2d Cir. 2000), which it believed supported that option (3/14/13 Tr. 46-51). The Court noted that it had "reminded Mr. Muth several times and encouraged him to cease his fast" (*id.* at 51). The Court then directly advised Muth, "[Y]ou have the right to be physically present in the courtroom for all stages of the proceedings and . . . you also have the right to face your accusers by physically being in the courtroom" (*id.* at 54). Asked if he "understood that," Muth replied, "Yes, I hear what you're saying" (*id.*). The Court repeatedly asked Muth whether he understood his right to be physically present at trial, and Muth continued to respond, "I hear what you're saying" (*id.*).

The Court then stated:

> I encourage you to cease your fast, so that you will be able to physically be in the courtroom.
>
> But if you continue your fast and if you're not physically able to be in the courtroom, the Court will consider that you have knowingly and voluntarily and intelligently waived your right to be physically present in the courtroom. (3/14/13 Tr. 54-55.)

Asked if he understood, Muth said, "[F]rankly, given the choice of throwing my luck in with a bunch of secularites or the heavenly host, in all due respect, I opt for God" (*id.* at 55; see also *id.* at 56 ("I follow orders. You follow yours. . . . It's a secular world. It's a religious world. You live in one. I live in the other.")).

The Court found that "at least at this stage of the proceedings," forcibly feeding Muth was not "a practical course to take" (3/14/13 Tr. 56). It noted that two-way video conference is an available technology in this case and one that has often been used in cases involving disruptive defendants (*id.* at 57).

At the April 25, 2013, hearing, the government proffered that, according to Dr. Ghabrai, Muth still is in "a state of chronic starvation" and cannot be brought safely to the courtroom (4/25/13 Tr. 3). The Court noted that the Department of Corrections had reported that Muth "intermittently eats quite a bit and then chooses not to eat for periods of time" (*id.* at 3). The Court referred to cases supporting the proposition that a court can proceed to trial where a defendant "by his own doing, knowingly and intelligently and

rationally chooses not to come to court or . . . orchestrates his own availability" (*id.* at 6). The Court concluded that "we are in this category of a disruptive defendant who has chosen of his own volition to absent himself from court" (*id.*). Finding that Muth "understands the consequences" of not making himself available for trial, the Court concluded that "if he chooses not to participate, that's his choice," and that "we go forward" (*id.* at 8). The Court found that using a video feed would mitigate the prejudice to Muth (*id.* at 8-9). Again expressing its determination to proceed to trial, the Court asked for briefing on the issue (*id.* at 10).

DISCUSSION

The issue of whether the Court properly may proceed to trial without Muth's physical presence in the courtroom implicates both the Constitution and Super. Ct. Crim. R. 43. The government views Muth's hunger strike as a deliberate and obstreperous attempt to avoid trial. Given the Court's clear warnings, we believe that Muth's continued refusal to accept regular nourishment reasonably could be viewed as a valid waiver of his constitutional right to attend trial. Although Rule 43 on its face prohibits beginning trial in Muth's absence, there is some authority suggesting that Muth's behavior in this case would constitute a waiver of his Rule 43 right to be present.

A. The Constitution

A criminal defendant is constitutionally "guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his [or her] presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987), *quoted in Kimes v. United States*, 569 A.2d 104, 108 (D.C. 1989). The constitutional right of presence is premised on both the Sixth Amendment Confrontation Clause and the Fifth Amendment Due Process Clause. *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam); *United States v. Gordon*, 264 U.S. App. D.C. 334, 338, 829 F.2d 119, 123 (1987). As with other constitutional rights, the right to be present may be waived by the defendant. *See, e.g., Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Diaz v. United States*, 223 U.S. 442, 455 (1912). Any such waiver must be knowing and voluntary, *Taylor v. United States*, 414 U.S. 17, 19-20 (1973), and "courts must indulge in every reasonable presumption against the loss of constitutional rights." *Illinois v. Allen*, 397 U.S. 337, 343 (1979) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

The waiver of the right to be present at trial need not be express. A defendant who knowingly and voluntarily absents himself from trial is deemed to have waived his constitutional right to be present. *E.g.*, *Taylor v. United States*, 414 U.S. at 20; *Diaz*, 223 U.S. at 455. Additionally, a defendant "can lose his right to be present at trial if, after he has been

warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Allen*, 397 U.S. at 343; *accord Snyder*, 291 U.S. at 106 (criminal defendant may lose right to be present by consent "or at times even by misconduct"). This Court reasonably could rely on either of these theories to find no constitutional violation in trying Muth *in absentia*.

First, Muth's decision not to accept food and liquid is the equivalent of a knowing and voluntary decision to flee. This type of waiver traditionally has been found where the defendant absconds after trial has begun. *E.g.*, *Diaz*, 223 U.S. at 455. Yet some courts have held that even if trial has not yet started, a defendant who absents himself knowingly, voluntarily, and without justification has waived the right to be present. *See United States v. Muzevsky*, 760 F.2d 83 (4th Cir. 1985); *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972).[1] Finding waiver in such circumstances reflects the

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[1] As discussed *infra*, the Supreme Court in *Crosby v. United States*, 506 U.S. 255 (1993), held that Fed. R. Crim. P. 43 prohibits the trial *in absentia* of a defendant who has fled before trial. The Court did not reach the issue whether the trial in the defendant's absence also was prohibited by the Constitution. *Id.* at 752. Thus, it reasonably may be argued that *Crosby*, with its focus on the specific language of Rule 43 in abscondence cases, did not overrule cases addressing waiver of the constitutional right to be present. (continued . . .)

notion that "[t]he deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice." *Tortora*, 464 F.2d at 1208.

Here, Muth has ample notice of the trial now scheduled for December 10, 2013. Furthermore, this Court repeatedly has advised Muth that he has a constitutional right to be present and that his continued efforts to absent himself from court would be viewed as a knowing and voluntary decision to waive his right to attend trial. There is also a strong public interest in proceeding to trial. *See Tortora*, 464 F.2d at 1210 (judge should exercise discretion to start trial without defendant "only when the public interest clearly outweighs that of the voluntarily absent defendant"). Muth stands charged with the most serious of offenses, and both the victim's family and the community at large deserve prompt justice. [2]

(. . . continued)
Indeed, at least one court post-*Crosby* has found waiver of the constitutional right where the defendant absconded right before the start of trial. *See Cuoco*, 208 F.3d at 30.

[2] In *Tortora*, the Second Circuit noted, "It is difficult for us to conceive of any case where the exercise of this discretion [to commence trial without the defendant] would be appropriate other than a multiple-defendant case. 464 F.2d at 1210 n.7. Notably, though, the court there did not foreclose the possibility of a trial *in absentia* in a single-defendant case, and the Second Circuit later found Sixth Amendment waiver where only one defendant was
(continued . . .)

Thus, if Muth persists in his hunger strike, the Court properly could view his conduct as a knowing and voluntary waiver of his constitutional right to be present at trial. *See Cuoco*, 208 F.3d at 30 ("Because Cuoco refused to attend the trial just before jury selection began and after both his counsel and the court warned him of the consequences of his failure to appear, Cuoco waived his Sixth Amendment right to attend the trial."); *DuFour v. State*, 495 So. 2d 154, 161 (Fla. 1986) (trial court did not abuse discretion in finding that defendant's absence at pretrial motions hearing was voluntary where defendant embarked on hunger strike that culminated in his hospitalization during the hearing); *see also United States v. Barton*, 647 F.2d 224, 238 (2d Cir. 1981) (trial court did not err in finding that defendant voluntarily absented himself from entire trial, where defendant scheduled eve-of-trial surgery for non-emergency condition that had been diagnosed 17 months earlier).

Second, Muth's deliberate conduct that is making him physically unable to come to court should be viewed as the type of obstructive conduct that justifies trial *in absentia* under *Illinois v. Allen*. Although *Allen* involved

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(. . . continued)
charged. *See Cuoco*, 208 F.3d at 30; *see also Muzevsky*, 760 F.2d 83 (no abuse of discretion in starting trial, despite fact that case involved only one defendant).

disruptive behavior in the courtroom, its rationale extends to this case. Muth's self-starvation already has delayed trial, and the medical evidence presented at the hearings indicates that Muth cannot safely attend trial unless he ends his hunger strike for good. In refusing to eat, Muth is disrupting the trial proceedings no less than a defendant who yells in the courtroom. The courtroom door stands open to Muth, who, if he chooses, can regain his health through regular nourishment (see 3/14/13 Tr. 19 (Muth "will be better" after 72 hours of eating and hydration)). Yet, like the defendant in *Allen*, Muth should not be "permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him." 397 U.S. at 346. Because the record establishes that Muth is aware of the consequences of his continued disruptive conduct, under *Allen*, this Court should have the discretion, if Muth insists on continuing his hunger strike, to begin trial in his absence without violating the Constitution. *Cf. Moore v. Campbell*, 344 F.3d 1313, 1322-24 (11th Cir. 2003) (state court reasonably found that defendant forfeited due-process right to be tried only if competent where defendant engaged in hunger strike, which contributed to his incompetency; "it was reasonable for the state court to find that Moore [in inducing his alleged incompetency] did so with the calculated intent of disrupting his trial") (internal quotation omitted).

B. Rule 43

In determining whether the defendant should be able to engage in manipulative conduct designed to avoid being brought to the courtroom for the commencement of his trial, but nevertheless be able to use Rule 43 as a sword to keep his trial from commencing, one should be mindful of the Supreme Court's view generally of such circumstances: a defendant should not be "permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him." *Allen*, 397 at 346. Indeed, the Supreme Court noted, "[i]t would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes." *Id.*; *see also id.* at 349 (Brennan, J., concurring) ("[T]here can be no doubt whatever that the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward."); *Tortora*, 464 F.2d at 1208 ("No defendant has a unilateral right to set the time or circumstances under which he will be tried.").

Under Rule 43, "[t]he defendant shall be present . . . at every stage of the trial including the impaneling of the jury . . . except as otherwise provided

by this Rule." Rule 43(a).[3] The defendant's presence is not required, however, where the defendant was "initially present" at trial and either voluntarily absents himself after trial has begun or, following a warning by the judge, "persists in conduct which is such as to justify exclusion from the courtroom." Rule 43(b)(1) and (2).[4] Rule 43 "incorporates the protections afforded by the Sixth Amendment Confrontation Clause, the Fifth Amendment Due Process Clause, and the common law right of presence . . . ." *Welch v. United States*, 466 A.2d 829, 838 (D.C. 1983); *accord Beard v. United States*, 535 A.2d 1373, 1375 (D.C. 1988). Thus, although the rule "has constitutional underpinnings, its protective scope is 'more far-reaching than the rights of presence protected by the Constitution.'" *Welch*, 466 A.2d at 839 n.7 (quoting *Arnold v. United States*, 443 A.2d 1318, 1327 (D.C. 1982)) (further internal citation omitted).

Crosby v. United States, 506 U.S. 255 (1993), presented the Supreme Court with the question whether federal Rule 43 "permits the trial *in*

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[3] Local Rule 43 is nearly identical to its federal counterpart. Where, as here, the local and federal rules are comparable, the District of Columbia Court of Appeals looks for guidance to cases interpreting the federal rule. *Montgomery v. Jimmy's Tire & Auto Ctr., Inc.*, 566 A.2d 1025, 1027 (D.C. 1989); *see Kimes*, 569 A.2d at 107-08 (citing federal cases for authority in discussing local Rule 43).

[4] The defendant does not need to be initially present for correction of sentence and other situations not applicable here. *See* Rule 43(c).

absentia of a defendant who absconds prior to trial and is absent at its beginning." *Id.* at 256. The Court unanimously held that "it does not." *Id.* Needless to say, the factual scenario in the instant case is quite different from the run-of-the-mill pre-trial absconder scenario presented in *Crosby*. To be clear, the government is not, in the instant case, contending that one who absconds prior to trial can or should be tried in *absentia*. To the contrary, when a defendant absconds prior to trial, the government ordinarily *does not* argue that the trial should commence. The government does not intend to change the prevailing practice in Superior Court when a defendant absconds prior to trial.

In the typical case of a defendant who flees prior to trial, there would have been no notice given to said defendant that the trial may proceed in his absence. By contrast, in the instant case, the defendant has been advised repeatedly by the court that if he continues to refuse nutrition, the trial can and will proceed in his absence. His continued conduct plainly is designed to thwart the court's ability to commence the trial. Again, the facts of this case are quite dissimilar to those in *Crosby*.

Importantly, years after *Crosby* was decided, the Second Circuit had occasion to instruct on the scope and reach of *Crosby's* Rule 43 pronouncement. In *Cuoco,* 208 F.3d 27, the defendant originally refused to allow himself to be transported from the jail to the courtroom for his trial.

Authorities eventually managed to transport Cuoco to the courthouse, at which point Cuoco told the judge he would rather not be present, including during jury selection. The judge inquired if he understood that he would be waiving important rights, and asked the defendant if he wished to be present, and the defendant said he did not. Accordingly, the trial court concluded that Cuoco had waived his right to be present, (inferentially) including at the commencement of the trial. The Second Circuit went on to discuss the applicability of *Crosby:* "*Crosby* established that Federal Rule of Criminal Procedure 43 precludes the trial *in absentia* of a defendant who flees before trial. *Id.* at 30. The court went on to instruct: "Cuoco argues that *Crosby* interpreted Rule 43 to impose a bright-line rule precluding the trial *in absentia* of a defendant who is not present for jury selection. We disagree . . . the [*Crosby*] Court addressed only the specific factual context of a defendant who fled prior to trial and declined to express an opinion on whether a defendant could waive the constitutional right to be present at trial – and by implication the protection of Rule 43 – in other circumstances." *Id.* at 31. Indeed, albeit in dicta, the Second Circuit indicated it would be inclined to find that Rule 43's right to be present at the commencement of trial could be waived under other circumstances: ". . . we would answer the question Crosby explicitly left undecided, whether Rule 43 could be waived under

circumstances other than those specified in subdivision (b) of that rule, in the affirmative." *Id.* at 32.

The Second Circuit went on to affirm Cuoco's conviction, specifically holding, *inter alia*, that Couco's trial attorney was not ineffective for failing to argue that Rule 43 precluded his trial from going forward, as it was "unlikely that a Rule 43 argument would have resulted in reversal of Cuoco's conviction . . ." *Id:, see also State v. Stanley*, 933 A.2d 184, 188 (Vt. 2007)(*Crosby* did not determine whether a defendant could waive the protection of Rule 43 in circumstances other than those present in *Crosby*).

Similarly, in *Stanley,* the Vermont Supreme Court had no hesitation in concluding that a defendant's conduct can constitute a waiver of his Rule 43 right to be present at the commencement of his trial. In *Stanley*, a trial court proceeded to trial, including jury selection, when a defendant, who had engaged in a series of acts designed to prevent his trial from moving forward, refused to be brought from the cellblock to the courtroom for jury selection in his trial. In affirming the trial court's ruling the Vermont Supreme Court pointedly concluded that the defendant had "voluntarily waived his right to be present at trial under Rule 43 by refusing to enter the courtroom despite the court's best efforts to encourage his presence." 376 A.2d at 188; (*see also*

In re Dunkerely, 376 A.2d 43, 47–48)(Vt. 1977)(Rule 43 waiver construed from defendant's actions, including nonattendance at his trial).[5]

Similarly, in a pre-*Crosby* ruling, the Supreme Court of New Jersey also has held that a defendant's conduct can be deemed to have waived his right to be present at the commencement of his trial. In *State v. Hudson*, 547 A.2d 434 (N.J. Sup. Ct. 1990), the defendants were in court on the morning of trial but absconded before jury selection began in the afternoon. Notably, New Jersey Rule of Criminal Procedure 3:16 is identical in all salient respects to our Rule 43, in that it provides: "the defendant's voluntary absence after trial has commenced in his presence shall not prevent its continuing to and including the return of the verdict." *Id.* at 441.

The *Hudson* Court concluded that there is no valid distinction to be drawn between a defendant who deliberately leaves the courtroom after the trial has begun as compared to a defendant who does so just before the trial

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[5] It should be noted that, subsequent to deciding *Crosby*, the Supreme Court, in *United States v. Mezzanatto*, 513 U.S. 196 (1995), commented as follows: "In *Crosby*, for example, we held that a defendant's failure to appear for any part of his trial did not constitute a valid waiver of his right to be present under Federal Rule of Criminal Procedure 43. We noted that the specific right codified in Rule 43 'was considered unwaivable in felony cases' at common law, and that Rule 43 expressly recognized only one exception to the common-law rule. 506 U.S. at 259. In light of the specific common-law history behind Rule 43 and the express waiver provision in the Rule, we declined to conclude that 'the drafters intended the Rule to go further.' *Id.*, at 260." 513 U.S. at 201-02.

is about to begin. 547 A.2d at 443. Indeed, the court pointed out the absurdity in an interpretation of Rule 3:16 that "would permit a defendant to postpone his criminal trial simply by leaving the courtroom before it starts. We are certain that Rule 3:16 was never intended to vest in defendants the power to decide whether trial should proceed as scheduled." *Id.* Accordingly, the New Jersey Supreme Court concluded: "we hold [under Rule 3:16] that a defendant's knowing, voluntary, and unjustified absence before or after trial has commenced does not prevent trial from proceeding in absentia." *Id.*[6]

In conclusion, the above cases seem to be most relevant to the issue of the propriety of commencing trial in the defendant's absence. Of course, just as in *Benabe,* where "the courtroom door remained open to these defendants on [the first day of trial] and every day thereafter, if only they were willing to promise to behave properly before the jury," 654 F.3d at 770, should the

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[6] *See Benabe*, 654 F.3d at 771-4 (finding Rule 43 violation in exclusion of two defendants from courtroom for disruptive behavior on day before trial commenced, but holding error harmless because "[o]n this record, the purpose of Rule 43 certainly was served.). It is axiomatic that any number of Constitutional rights, statutory rights, and rights provided by rules of evidence and of procedure can be waived by defendants either expressly or though misconduct. For example, it is well settled that a defendant forfeits his Sixth Amendment right of confrontation (and any hearsay objection) "if he wrongfully procured the unavailability of that witness with the purpose of preventing the witness from testifying." *Roberson v. United States*, 961 A.2d 1092, 1095 (D.C. 2008); *accord Zanders v. United States*, 999 A.2d 149, 155 (D.C. 2010); *Devonshire v. United States*, 691 A.2d 165, 166 (D.C. 1997).

defendant decide to eat, he could be in a position to attend the trial, at its commencement and every day thereafter.

CONCLUSION

The government respectfully offers the above authority on the issue of the commencing a trial in a defendant's absence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have e-mailed a copy of the foregoing to counsel for defendant, Dana Page and Craig Hickein, Public Defender Service, 633 Indiana Avenue, N.W., Washington, D.C. 20004, on this 19th day of July, 2013.

Assistant United States Attorney